No. 83-10

IN THE

Supreme Court of the United States

October Term, 1983

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND,

Petitioner,

against

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased.

Respondents.

SUPPLEMENTAL APPENDIX

NOEL ARNOLD LEVIN*
101 Park Avenue
New York, N. Y. 10178
(212) 309-6130

MARK EDWARD BROSSMAN
101 Park Avenue
New York, N. Y. 10178

Of Counsel:
MORGAN, LEWIS & BOCKIUS
*Counsel of Record

United States Court of Appeals

For the Second Circuit

No. 704 August Term, 1982

(Argued January 6, 1983 Decided February 18, 1983)

Docket No. 82-7631

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND,

Plaintiff-Appellant,

-against-

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER, deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler deceased,

Defendants-Appellees.

Before: KAUFMAN, TIMBERS AND NEWMAN, *Circuit Judges.*

Appeal by the plaintiff from a judgment entered on an order of the United States District Court for the Southern District of New York, William C. Conner, *Judge*, dismissing its complaint for lack of subject matter jurisdiction.

Affirmed.

JOSEPH P. HOEY, Mineola, New York
(Suozzi English & Cianciullo, P.C., Stephen C. Glasser, *of Counsel*), *for the Plaintiff-Appellant.*

VINCENT R. FITZPATRICK, JR., New York, New York (White & Case, Dwight A. Healy, Richard A. Horsch; Hughes & Hill, H. Robert Powell, Dallas, Texas, *of Counsel*), *for the Defendants-Appellees,* Reserve Life Insurance Co. and American Progressive Life and Health Insurance Company of New York.

ROBERT S. COHEN, New York, New York
(Lans, Feinberg & Cohen, Deborah E. Lans, *of Counsel*), *for the Defendants-Appellees,* George S. Kriegler, Benjamin A. Kriegler and Raymond M. Kriegler (deceased).

KAUFMAN, *Circuit Judge:*

In the last decade, Congress has enacted nearly one hundred statutes granting additional jurisdiction to the federal courts. Areas as diverse as environmental law and child custody have been brought within the purview of the federal judiciary. Exercising this new jurisdiction, however, requires us not only to adjudicate complex disputes, but also to define the limits of our expanded authority. The instant action, brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, provides one such occasion. We are called upon today to determine, as a matter of first impression, whether a pension fund may assert a federal cause of action under the provisions of that important employee benefits statute.

I

The Pressroom Unions-Printers League Income Security Fund (the "Fund") was established in May 1971 to provide life insurance and mutual fund benefits to members of the New York Printing Pressmen's & Offset Workers Union, Local 51. In later years members of two other unions were allowed to participate in the Fund pursuant to their collective bargaining agreements.[1] The Fund currently has approximately 1,700 participants and is financed by contributions from the employers of the union members. Its management functions are vested in a Board of Directors whose membership consists of union and employer representatives in equal numbers.

The Fund contends that during the period from July 1, 1971 through June 30, 1980 it was the victim of a fraudulent scheme engineered by appellees George S. Kriegler, Benjamin A. Kriegler and Raymond M. Kriegler, deceased ("Krieglers"). The gravamen of this charge is that George and Raymond Kriegler were officers and stockholders of Labor Security Programs, Inc. ("LSP"), a consulting firm engaged by the Fund, and they allegedly caused LSP to enter into insurance contracts at exorbitant rates. Allocation and assignment of such contracts purportedly depended upon the results of a competitive bidding

process, but the Krieglers allegedly circumvented this procedure and gave appellees Continental Assurance Co. ("Continental") and Reserve Life Insurance Co. ("Reserve") the exclusive right to sell insurance to the Fund.[2]

The Fund's complaint alleges that the insurance contracts resulted in excessive premium payments to the insurers and extravagant fees to the Krieglers. The Fund further contends that appellees concealed the fraudulent nature of the insurance contracts from the Board of Directors by providing misleading statements and reports. The Krieglers, it is claimed, perpetuated this fraud by providing false assurances to the Board and by misrepresenting the nature of the contracts entered into and the process through which the insurers were selected.

In January 1982 the Fund filed suit in the Southern District of New York asserting that appellees breached their fiduciary duties, and seeking declaratory relief as well as compensatory and punitive damages. Jurisdiction was said to be based upon the relevant provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1132(e) ("ERISA") and the Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 308(g) ("WPPDA").[3] The defendants moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, claiming that neither statute afforded the Fund a cause of action cognizable in federal court. The district judge granted the defendants' motion and dismissed the complaint on June 3, 1982. He also denied the Fund's request to amend its complaint. Subsequently the Fund moved for reconsideration of the district court's order, and sought to substitute individual plan participants as plaintiffs. Judge Conner denied this request,[4] and the Fund now appeals from the judgment entered on his order and from the supplemental order denying its motion for reconsideration.[5]

II

The jurisdictional provisions of ERISA do not on their face authorize a pension fund to assert a cause of action. 29 U.S.C. § 1132(e)(1) gives the district courts "exclusive jurisdiction of

civil actions under this subchapter brought by the Secretary [of Labor] or by a participant, beneficiary or fiduciary." Similarly, § 1132(a), the Act's provision dealing with standing, states that the Secretary or a "participant, beneficiary or fiduciary" may bring an action for civil enforcement of the Act's fiduciary and other provisions.

The Fund does not contend that it may be viewed as one of the parties specifically authorized to file suit under these provisions; rather, it claims that these sections are not exclusive and do not foreclose the possibility of other parties suing under the Act. In support of this assertion, the Fund argues that § 1132(d)(1), which states that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity," contemplates the existence of a cause of action which a pension fund may assert, and therefore necessarily implies that federal jurisdiction would exist for such suits.

It is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that the courts are not to infer a grant of jurisdiction absent a clear legislative mandate. *Rice* v. *Railroad Co.*, 66 U.S. (1 Black) 358, 374 (1861); *Dalehite* v. *United States*, 346 U.S. 15, 30-31 (1953); *see also Middlesex County Sewerage Authority* v. *National Sea Clammers Assoc.*, 453 U.S. 1, 13-18 (1981). We therefore decline to construe § 1132(d)(1) as *sub silentio* conferring jurisdiction over actions brought by parties other than those specified in § 1132(e)(1).

We have previously held that an employer, also not named in ERISA's jurisdictional provisions, may not bring suit under the Act. *See Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323, 326 (2nd Cir. 1982). While this does not, of course, resolve the instant dispute, it does undercut the Fund's reliance on *Fentron Industries, Inc.* v. *National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982) *("Fentron")*. In *Fentron* the court held that an employer could bring an action pursuant to ERISA. Although neither § 1132(a) nor § 1132(e)(1) specifically authorizes suits by employers, the court observed "[t]here is

nothing in the legislative history to suggest . . . that the list of parties empowered to sue under this section is exclusive. . . ." *Fentron, supra,* 674 F.2d at 1305.[6]

In our view, the *Fentron* court applied an inappropriate standard in resolving this issue. We focus not on whether the legislative history reveals that Congress intended to *prevent* actions by employers or other parties, but instead on whether there is any indication that the legislature intended to *grant* subject matter jurisdiction over suits by employers, funds, or other parties not listed in § 1132(e)(1). As the Ninth Circuit noted, ERISA's legislative history is silent on both of these questions, *see, e.g.,* H.R. Conf. Rep. No. 1280, 93rd Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5109 (1974), and we therefore conclude that absent such expression, § 1132(e)(1) should be viewed as an exclusive jurisdictional grant.[7]

What makes the instant case both unique and difficult is the language of § 1132(d)(1) which provides that a fund "may sue or be sued under this subchapter as an entity." There is no doubt that this section authorizes suits against a fund. The difficulty arises with those portions of the section which authorize a fund to bring an action. The uncertainty generated by this language, however, is troubling only upon first blush. More careful analysis demonstrates that § 1132(d)(1) is not inconsistent with the specific and exclusive grant of subject matter jurisdiction contained in § 1132(e)(1). Subsection (d)(1) is captioned "status of employee benefit plan as entity," and only establishes the right of plans created by ERISA to sue and be sued like corporations and other legal entities. Without such a provision a pension plan would not be a legally cognizable body. *See, e.g., Coverdell* v. *Mid-South Farm Equipment Assoc.,* 335 F.2d 9, 12-13 (6th Cir. 1964). Affording plans the power to sue does not, however, imply that they may bring actions under ERISA; it merely authorizes suits to be brought by funds in other situations where there would properly be jurisdiction.[8] For example, if a fund became

involved in a contract dispute, and wished to pursue a state law contract claim, § 1132(d)(1) would allow the fund to bring such an action in its own name.

The Fund would have us accept the argument that the carefully drafted provisions extending federal jurisdiction and standing to pension plan participants, beneficiaries and fiduciaries were incomplete, and that those sections do not foreclose the possibility of actions brought by other parties. In the light of the frequent references in the Act and its legislative history to "participants, beneficiaries and fiduciaries," *see, e.g.*, 29 U.S.C. § 1132(h); H.R. Rep. No. 533, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4655 (1974), this conclusion is untenable. It is more probable that Congress's use of the words "or sue as an entity" in § 1132(d)(1) were not considered in the context of standing or jurisdiction. This interpretation is both more plausible than the Fund's view, and, as we have noted, resolves the superficial ambiguity between § 1132(d)(1) and the standing and jurisdictional provisions.

According, we hold that the district court was without subject matter jurisdiction over the Fund's complaint and Judge Conner properly dismissed the action.

III

The Fund further contends that the district court erred in denying its motion for leave to amend the complaint and substitute plan participants as plaintiffs.

The longstanding and clear rule is that "if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim." *Pianta* v. *H.M. Reich Co.*, 77 F.2d 888, 890 (2d Cir. 1935); *see also United States ex. rel. Rudick* v. *Laird*, 412 F.2d 16 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969). The Fund attempts to escape this doctrine by relying on 28 U.S.C. § 1653 which provides that "defective allegations of jurisdiction may be amended, upon terms in the trial or appellate courts."

While we have previously noted that § 1653 should be broadly construed to avoid dismissals of actions on technical grounds, *John Birch Society* v. *National Broadcasting Co.*, 377 F.2d 194, 198-99 (2d Cir. 1967), we have never allowed that provision to create jurisdiction retroactively where none existed. Section 1653 allows "amendment only of defective *allegations* of jurisdiction; it does not provide a remedy for defective jurisdiction itself." *Weld* v. *Volkswagenwerk AG*, 626 F.2d 293, 306 (3rd Cir. 1980) (emphasis in original). In this case the Fund seeks not to remedy inadequate jurisdictional allegations, but rather to substitute a new action over which there is jurisdiction for one where it did not exist. Accordingly, Judge Conner properly denied the Fund's motion to amend its complaint pursuant to that provision.[9]

The Fund's reliance on *Rheingold Breweries Pension Plan* v. *PepsiCo, Inc.*, 2 Empl. Ben. Case. 2406 (S.D.N.Y. 1981), is also misplaced. In *Rheingold* Judge Stewart permitted amendment after holding that the plaintiff fund had no standing to sue under § 1132(a). The court, however, never reached the more fundamental issue of whether there was subject matter jurisdiction over such an action. Moreover, the *Rheingold* opinion, filed before the Fund's suit was commenced, should have put the Fund in this case on notice that it would have difficulty in pressing its claims under its own name. Even if the district court had the authority to consider the propriety of the amendment request, therefore, it could have properly denied the motion in its discretion. *See Cox* v. *Livingston*, 407 F.2d 392 (2d Cir. 1968) (motions to amend pursuant to § 1653 are addressed to the court's discretion). If the Fund was aware of Judge Stewart's ruling, it has advanced no reason for its original failure to name alternative plaintiffs in the event that Judge Conner followed *Rheingold* and refused to allow the Fund to sue in its own name. In the event that the Fund was unaware of the *Rheingold* case, it cannot now assert that it detrimentally relied on that portion of the opinion where the court allowed the plaintiff to amend its complaint.

Accordingly, we find Judge Conner properly concluded that there was no subject matter jurisdiction to hear the claims

asserted and he correctly granted appellees' motion to dismiss. Because it was without jurisdiction, the judge appropriately denied the request to amend the complaint. The judgment and supplemental order of the district court are affirmed.

FOOTNOTES

1. Beginning in May 1975 members of the New York Press Assistants and Offset Workers Union, Local 23 became participants in the Fund, and in May 1976 coverage was extended to employees represented by the Paper Handlers and Sheet Straighteners, Local 1.

2. Continental underwrote the life insurance contracts for plan participants from 1971 until July 1979. Thereafter Continental's rights and obligations were assumed by Reserve which became the successor in interest to the former corporation upon its dissolution. Reserve, a Texas corporation not licensed to do business in New York State, transacted its affairs in New York through its wholly-owned subsidiary, American Progressive Life & Health Corporation.

3. The WPPDA antedated and was repealed by ERISA. The relevant section of ERISA, however, provided that the WPPDA "shall continue to apply to any conduct and events which occurred before [ERISA's] effective date, [January 1, 1975]." 29 U.S.C. §§ 1031(a)(1), 1144.

4. In its motion for reconsideration, the Fund, for the first time, identified those persons it sought to substitute as plaintiffs. These individuals have since filed a separate action in the United States District Court for the Southern District of New York, *Buccino* v. *Continental Assurance Co.*, No. 82 Civ. 5530. The parties have represented, however, that there are potential statute of limitations problems which may preclude a full decision on the merits in that action.

5. The Fund does not challenge the district court's finding that there was no jurisdiction under the WPPDA.

6. The Fund mistakenly relies on *United States Steel Corp.* v. *Pennsylvania Human Relations Commission*, 669 F.2d 124 (3rd Cir. 1982), in support of its claim that § 1132(a) is not exclusive. The court in *United States Steel* did not imply that the specific standing provision of § 1132(a) was not exclusive, but held only that on the facts of that case the plaintiff employer could be viewed as a plan fiduciary and therefore have standing *as a fiduciary* under the Act. *Id.* at 126-28.

7. Since the plaintiff has not claimed subject matter jurisdiction under 28 U.S.C. § 1331 (1976) in its complaint nor in its papers submitted to this Court, we express no views on the possible relevance of that statute. *See Monell* v. *Department of Social Services*, 532 F.2d 259, 260 n.1 (2d Cir. 1976), *rev'd on other grounds*, 436 U.S. 658 (1978).

8. The district judge indicated that in some circumstances a fund might be a participant, beneficiary or fiduciary, in which case it would be able to assert a cause of action in its own name. In the district court's view this possibility resolved the ambiguity between § 1132(e)(1) and

§ 1132(d)(1). We find it difficult to imagine a situation in which a fund could fulfill one of these roles. *See* 29 U.S.C. § 1002(7), (8), (21) (definitions of "participant," "beneficiary," and "fiduciary"). We do not, however, believe it is necessary to accept the district court's view to reconcile the apparently contradictory provisions.

9. Appellant also claims that the district court was foreclosed from dismissing its complaint pursuant to Fed. R. Civ. P. 17(a). That rule in relevant part states, "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed . . . [for] joinder or substitution of the real party in interest." This argument, however, ignores the fact that the action was not dismissed for failure to name the real party in interest, but rather because the district court had no jurisdiction over the suit. Rule 17(a) does not, of course, expand the jurisdiction of the federal judiciary. *See* Fed. R. Civ. P. 82.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of April, one thousand nine hundred and eighty-three.

Present: HONORABLE IRVING R. KAUFMAN
HONORABLE WILLIAM H. TIMBERS
HONORABLE JON O. NEWMAN,

Circuit Judges.

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND,

Plaintiff-Appellant,

v.

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER, deceased, by Joe Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased,

Defendants-Appellees.

OPINION

Upon consideration of appellant's petition for rehearing, it is hereby ORDERED that the opinion filed February 18, 1983, is amended in the following respects:

1. Page 1888, lines 13-16 - "Subsection (d)(1) is captioned "status of employee benefit plan as entity." and only establishes the right of plans created by ERISA to sue and be sued like corporations and other legal entities." is hereby amended to read "Subsection (d)(1) only establishes the right of employee benefit plans created by ERISA to sue and be sued like corporations and other legal entities."

2. Page 1890, Footnote 9 - The following paragraph is hereby added as the first paragraph in Footnote 9.

> "Though we have previously recognized that an amendment adding a party that brings the case within a district court's jurisdiction can be granted, *Hackner* v. *Guaranty Trust Co.*, 117 F.2d 95 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941), such an amendment, where new service is required, does not relate back to the original suit, *id.* at 99, and would be a new action, *id.*; *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 518 (2d Cir. 1944) (construing Hackner), *rev'd on other grounds*, 326 U.S. 99 (1945). In such circumstances, the district court has discretion whether to permit the "amendment," *cf. National Maritime Union* v. *Curran*, 87 F. Supp. 423, 426 (S.D.N.Y. 1949), and Judge Conner properly exercised his discretion to deny the motion to amend after noting that possible statute of limitations defenses distinguished this case from *Hackner*, where no such obstacles appeared."

3. The petition for rehearing is otherwise denied.

Irving R. Kaufman

IRVING R. KAUFMAN

William H. Timbers

WILLIAM H. TIMBERS

Jon O. Newman

JON O. NEWMAN,

Circuit Judges.

OPINION AND ORDER DATED JUNE 3, 1982 (Pages 65a-73a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 578 (WCC)
OPINION AND ORDER

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND,

Plaintiff,

-against-

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER, deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased,

Defendants.

APPEARANCES:

SUOZZI, ENGLISH & CIANCIULLI, P.C.
Attorneys for Plaintiff
1505 Kellum Place
Mineola, New York 11501

JOSEPH P. HOEY, ESQ.,
ROBERT M. ARCHER, ESQ.,
RONALD E. SOMMER, ESQ.,
STEPHEN C. GLASSER, ESQ,
Of Counsel

WHITE & CASE, ESQS.
Attorneys for Defendants Reserve Life Insurance Company and American Progressive Life and Health Insurance Company of New York
14 Wall Street
New York, New York 10005

VINCENT R. FITZPATRICK, JR., ESQ.,
DWIGHT A. HEALY, ESQ.,
Of Counsel

H. ROBERT POWELL, ESQ.,
EUGENE ZEMP DUBOSE, ESQ.,
HUGHES & HILL, ESQS.
1000 Mercantile Dallas Building
Dallas, Texas 75201
Of Counsel

LANS FEINBERG & COHEN, ESQS.
Attorneys for Defendants George S. Kriegler, Benjamin A. Kriegler and Raymond M. Kriegler
555 Madison Avenue
New York, New York 10022

ROBERT STEPHAN COHEN, ESQ.,
DEBORAH E. LANS, ESQ.,
Of Counsel

CONNER, D. J.:

This action purportedly arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the Welfare and Pension Plans Disclosure Act ("WPPDA"), 29 U.S.C. § 301, *et seq.*, as well as under certain statutes and the common law of the State of New York. Jurisdiction over the state law claims is alleged to be based upon principles of pendent jurisdiction. Presently before the Court are the motions of various defendants to dismiss the amended complaint for lack of jurisdiction over the subject matter, Rule 12(b)(1), F.R.Civ.P. For the reasons which follow, the motions are granted.

Plaintiff Pressroom Unions-Printers League Income Security Fund (the "Fund") is identified in the amended complaint as an employee income security fund within the meaning of Section 3(1) of ERISA, 29 U.S.C. § 1002(1), and an employee benefit plan subject to the provisions of ERISA pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a).

Defendant Continental Assurance Co. ("Continental") is alleged to have underwritten the Fund's life insurance from July 1, 1971 through July 1, 1979. Defendants Reserve Life Insurance Co. ("Reserve") and its wholly-owned subsidiary American Progressive Life & Health Insurance Company of New York ("Progressive") are alleged to have acquired the rights and obligations of Continental as underwriters of the Fund's life insurance during the period subsequent to July 1, 1979.

Defendants George S. Kriegler, Raymond M. Kriegler, deceased, and Benjamin A. Kriegler are identified as having been administrators and/or fiduciaries of the Fund. Defendant Labor Securities Programs, Inc. ("LSP") is a corporation owned and managed at least in part by George Kriegler and Raymond Kriegler.

As to the claims arising under federal law, it is essentially alleged that each of the defendants engaged in a fraudulent scheme directed against the Fund in violation of each defendant's fiduciary obligations under ERISA.

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), specifies the Secretary of Labor, participants, beneficiaries and fiduciaries as those persons who have standing to prosecute a civil action under ERISA. In turn, Section 502(e) of ERISA, 29 U.S.C. § 1132(e), limits the jurisdiction of United States district courts to civil actions brought by the Secretary of Labor, participants, beneficiaries or fiduciaries.

It is not disputed that the Fund is not the Secretary of Labor, a participant, a beneficiary or a fiduciary as those terms are defined in ERISA. Accordingly, it is manifest both that this Court lacks subject matter jurisdiction over the Fund's ERISA claims and that the Fund lacks standing to prosecute such claims. This Court has previously so held in *Rheingold Breweries Pension Plan* v. *Pepsico, Inc.*, No. 81 Civ. 1561 (S.D.N.Y. November 17, 1981) (Stewart, J.). See also *Mechanical Construction Corp.* v. *Benedict*, No. 76 Civ. 5426 (S.D.N.Y. March 16, 1978) (Conner, J.); *Hibernia Bank* v. *International Brotherhood of Teamsters*, 411 F. Supp. 478, 488-89 (N.D. Cal. 1976).[1]

The Fund's reliance on Section 502(d) of ERISA, 29 U.S.C. § 1132(d), is misplaced. That section provides that an employee benefit plan may sue or be sued as an entity, and further provides for service upon and enforcement of judgments against such plans. Section 502(d) addresses neither jurisdiction nor standing, but rather the legal capacity of a fund to sue or be sued as an entity. In other words, if a fund was also a participant, beneficiary or fiduciary so that it had standing to sue under Section 502(a), 502(d) makes it clear that it could sue as an entity.

Accordingly, the Fund's ERISA claims against each of the defendants must be dismissed for lack of subject matter jurisdiction.[2]

The Fund also seeks to predicate subject matter jurisdiction upon Section 9(g) of WPPDA, 29 U.S.C. § 308(g), although the amended complaint nowhere alleges that any of the alleged conduct of defendants violated any provision of WPPDA. In any event, it is plain that the Fund lacks standing to prosecute any claim under WPPDA. The only private right of action available

under WPPDA is one brought by a participant or beneficiary to recover $50 per day from any plan administrator who fails to make certain requested publications. As the Fund is not a participant or a beneficiary, it lacks standing to prosecute any action under WPPDA.

Accordingly, the Fund's WPPDA claims, if any, against each of the defendants must be dismissed.[3]

In view of the dismissal of the purported federal law claims, the exercise of pendent jurisdiction over the Fund's state law claims would be inappropriate. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Accordingly, the amended complaint is dismissed, without prejudice to the prosecution of any state law claims in a court of competent jurisdiction.[4]

SO ORDERED.

William C. Conner

United States District Judge

Dated: New York, New York
June 3, 1982

FOOTNOTES

In a recent decision, Fentron Industries, Inc. v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. April 21, 1982), the Ninth Circuit permitted an employer to bring suit under ERISA notwithstanding the fact that the employer did not fit within the definition of any of those authorized to bring suit by Section 502(a). The court first found that the employer had suffered an injury in fact and that such injury fell within the zone of interests protected by ERISA. After thus concluding that the employer had standing in the constitutional sense, the court then directed its inquiry to whether the statute itself precluded the suit, and specifically the fact that employers qua employers are not among those authorized to bring suit under Section 502(a). In this regard, the court merely concluded:

"The omission of employers from 29 U.S.C. § 1132 is not significant in this regard. There is nothing in the legislative history to suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers" (footnote and citations omitted). *Id.* at 1305.

The court's reasoning is not persuasive. As the court recognized, the existence of standing in the constitutional sense is not a sufficient basis for maintenance of a statutory cause of action in the face of a statutory prohibition. Here Congress, by Section 502(a), has specified those who may bring suit under the statute. If unspecified others may also bring suit, then Section 502(a) is meaningless. Manifestly a statutory provision should not be interpreted in such a manner as to render it meaningless. Yet the *Fentron* court reaches such a result, and does so on the basis of legislative history which is admittedly silent on the question of the exclusivity of Section 502(a).

Furthermore, the *Fentron* court ignores Section 502(e), which limits federal court jurisdiction to the actions specified in Section 502(a). Congress could hardly have more clearly specified that this Court's jurisdiction is limited exclusively to actions brought by those authorized to sue under Section 502(a).

2. Although only Reserve, Progressive, George Kriegler, Benjamin Kriegler and Raymond Kriegler have moved to dismiss, Continental has raised this defense in its Answer, and in any event the absence of subject matter jurisdiction prevents this Court from entertaining the ERISA claims as to any defendant. See Rule 12(h)(3), F.R.Civ.P.

3. Again although not all defendants have moved to dismiss, this defense appears in the Answer of Continental, the Fund's lack of standing plainly precludes its prosecution of any WPPDA claim against any defendant, and the Fund has had notice and the opportunity to be heard

on this issue in connection with this motion. Accordingly, no sound reason appears why the Court's ruling as to the WPPDA claims should not be made applicable to all defendants.

It should also be noted that WPPDA, which was repealed by 29 U.S.C. § 1031(a)(1) except as to conduct and events occurring prior to January 1, 1975, cannot apply to Reserve and Progressive, whose alleged transgressions all post-date July 1, 1979.

4. The Fund has requested that, in the event the motions of defendants are granted, it be given leave to amend the complaint to name a proper plaintiff. The request is denied. Since the Fund has no claim over which this Court has subject matter jurisdiction, the Fund cannot be a proper plaintiff in this action.

Plainly what the Fund envisions is a substitution of another plaintiff for itself. Such an amendment would involve not merely the correction of a misnomer as to the proper plaintiff, but rather a substitution of an unrelated party to prosecute the action. Moreover, the Fund has not identified such a party or indicated that any party is willing to be so substituted. Since this Court lacks jurisdiction over the Fund's claims, I can hardly retain jurisdiction while the Fund searches for a substitute plaintiff. Prior to the dismissal of this action, a proper plaintiff might have moved to intervene, but no such application has been made.

OPINION AND ORDER DATED AUGUST 2, 1982
(pages 90a-104a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 578 (WCC)

OPINION AND ORDER

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND,

Plaintiff,

-against-

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER, deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler deceased,

Defendants.

APPEARANCES:

SUOZZI, ENGLISH & CIANCIULLI, P.C.
Attorneys for Plaintiff
1505 Kellum Place
Mineola, New York 11501

JOSEPH P. HOEY, ESQ.,
BRIAN MICHAEL SELTZER, ESQ.,
Of Counsel

McCORMICK DUNNE & FOLEY, ESQS.
Attorneys for Defendant
Continental Assurance Co.
71 Broadway
New York, New York 10006

JOHN B. FOLEY, ESQ.,
JOSEPH P. ALTMAN, JR., ESQ.,
Of Counsel

WHITE & CASE, ESQS.
Attorneys for Defendants
Reserve Life Insurance Company,
American Progressive Life &
Health Insurance Company of N.Y.
14 Wall Street
New York, New York 10005

VINCENT R. FITZPATRICK, JR., ESQ.,
DWIGHT A. HEALY, ESQ.,
Of Counsel

H. ROBERT POWELL, ESQ.,
EUGENE ZEMP DUBOSE, ESQ.,
HUGHES & HILL, ESQS.
1000 Mercantile Dallas Building
Dallas, Texas 75201
Of Counsel

LANS FEINBERG & COHEN, ESQS.
Attorneys for Defendants George
S. Kriegler, Benjamin A. Kriegler
and Raymond M. Kriegler
555 Madison Avenue
New York, New York 10022

ROBERT STEPHAN COHEN, ESQ.,
DEBORAH E. LANS, ESQ.,
Of Counsel

CONNER, D. J.:

By Opinion and Order dated June 3, 1982, familiarity with which is presumed, this Court granted defendants' motions to dismiss for lack of jurisdiction over the subject matter, Rule 12(b)(1), F.R.Civ.P. The crux of the Court's June 3 ruling was that plaintiff Pressroom Unions-Printers League Income Security Fund (the "Fund") is not within those categories of persons authorized to bring suit under Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), and thus that the Fund's claims do not fall within this Court's subject matter jurisdiction as defined by Section 502(e) of ERISA, 29 U.S.C. § 1132(e). The Court also denied the Fund's application for leave to "amend" the complaint to "name a proper plaintiff" in the event the Court ruled as it did in granting defendants' motions.

Presently before the Court is the motion of the Fund to alter or amend the judgment of dismissal pursuant to Rule 59(e), F.R.Civ.P. For purposes of this motion, the Fund seeks only reconsideration of that portion of the Court's June 3 ruling which denied the Fund's request to "amend" the complaint after its dismissal in order to "name a proper plaintiff." For the reasons that follow, the Fund's motion is denied.

In originally denying the Fund's application to amend, the Court wrote:

> The Fund has requested that, in the event the motions of defendants are granted, it be given leave to amend the complaint to name a proper plaintiff. The request is denied. Since the Fund has no claim over which this Court has subject matter jurisdiction, the Fund cannot be a proper plaintiff in this action.
>
> Plainly what the Fund envisions is a substitution of another plaintiff for itself. Such an amendment would involve not merely the correction of a misnomer as to the proper plaintiff, but rather a substitution of an unrelated party to prosecute the action. Moreover, the Fund has not identified such a party or indicated that any party is

> willing to be so substituted. Since this Court lacks jurisdiction over the Fund's claims, I can hardly retain jurisdiction while the Fund searches for a substitute plaintiff. Prior to the dismissal of this action, a proper plaintiff might have moved to intervene, but no such application has been made.

In an apparent effort to "cure" what it perceived to be the defect in its original application, the Fund has submitted affidavits indicating the willingness of at least one participant and beneficiary of the Fund to be substituted as a plaintiff in this action. It may be assumed that the proposed substituted plaintiff or plaintiffs are "proper plaintiffs" pursuant to Section 502(a) of ERISA and thus that this Court would have subject matter jurisdiction over such an action pursuant to Section 502(e) of ERISA. Nevertheless, the Fund's motion must be denied.

Nothing in the Court's June 3 Opinion and Order inhibits in any way the ability of any party enumerated in Section 502(a) to bring an action within this Court's subject matter jurisdiction as specified by Section 502(e). Instead, however, the Fund seeks to resurrect an action over which the Court does not, and never did, have subject matter jurisdiction in order to file a purported "amendment" substituting other plaintiffs for itself and thus retroactively converting the action into one over which this Court has jurisdiction. Both reason and precedent dictate that the Court is without power to grant the relief sought by the Fund.

It is axiomatic that, as a court of circumscribed jurisdiction, this Court's power is limited to those actions which Congress has specified to be within its jurisdiction. "If a court lacks jurisdiction over an action, it lacks the power to act with respect to that action." *Rudick* v. *Laird*, 412 F.2d 16, 20 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969). Thus, as defendants persuasively contend, where as here the Court lacks jurisdiction over the action, it lacks the power to act on a motion such as that made by the Fund.[1]

Several court decisions in analogous circumstances support defendants' position. Thus, for example, in *Pianta* v. *H. M.*

Reich Co., 77 F.2d 888 (2d Cir. 1935), a creditor with a claim for less than the jurisdictional amount necessary for diversity jurisdiction sought the appointment of a receiver for the debtor corporation. The receivers who had been appointed sought to remedy the jurisdictional defect *nunc pro tunc* by obtaining an order of the district court directing the intervention of a creditor whose claim exceeded the jurisdictional amount. The Court of Appeals reversed that order and directed dismissal of the claim:

> We think the district judge has no power to enter such an order. The right to intervene presupposes an action duly brought, and if jurisdiction is lacking at the commencement of the suit, it cannot be aided by the intervention of a creditor with a sufficient claim.
>
> *Id.* at 890.

In *Interstate Commerce Commission* v. *Southern Railway Co.*, 380 F. Supp. 386 (M.D.Ga. 1974), *aff'd in relevent part*, 543 F.2d 534 (5th Cir. 1976), the court found that the ICC did not have statutory authority to maintain the action; the statute provided that such suits must be brought by or against the United States. In dismissing the action, the court held that its conclusion could not be affected by motions of interested persons to intervene and to name the United States as a party, reasoning that

> it is elementary that jurisdictional defects in the original complaint cannot be remedied by the papers of intervenors, nor can authority to bring a suit be bestowed by intervenors on an original plaintiff where no such authority existed prior to intervention.
>
> * * *
>
> Given the presence of a fatal defect in the ICC's complaint, it is, of course, plain that the complaint must be dismissed, and from this it follows that there remains no action in which Nashville Milling Company and Mr. Lee may intervene.
>
> *Id.* at 394-95.

In *Jacobs* v. *District Director of Internal Revenue*, 217 F. Supp. 104 (S.D.N.Y. 1963), the court found that it was without jurisdiction as the suit was barred by the doctrine of sovereign immunity. The United States sought to intervene in an "attempt to give the court jurisdiction it now lacks." *Id.* at 106. The court denied the motion to intervene, ruling that such intervention "cannot be granted as there is present no jurisdictional foundation upon which the court may act." *Id.*

In *Oster* v. *Rubenstein*, 136 F. Supp. 733 (S.D.N.Y. 1955), the court found an absence of diversity of citizenship between the plaintiffs and the original defendant. The plaintiffs, however, had substituted the original defendant's executors as defendants, and there did exist diversity of citizenship between the plaintiffs and the substituted defendants. The court nevertheless dismissed the action for lack of subject matter jurisdiction, ruling that "jurisdiction may not be conferred upon the court by means of a substitution of parties." *Id.* at 734.[2]

And in *Schmoll Fils, Inc.* v. *The Fernglen*, 85 F. Supp. 578 (S.D.N.Y. 1949), where the court found diversity of citizenship jurisdiction lacking, the court refused to allow the intervention of a United States corporation as a party plaintiff. Although the presence in the suit of the proposed intervenor would have been sufficient to establish federal jurisdiction, the court concluded that

> [i]ntervention may not be allowed for that purpose. An existing suit within the Court's jurisdiction is a prerequisite to intervention. Intervention cannot give life to a lawsuit which does not actually exist, nor can it create jurisdiction where no jurisdiction exists.
>
> *Id. at 579.*

See also, Turner v. *First Wisconsin Mortgage Trust*, 454 F. Supp. 899, 913 (E.D. Wisc. 1978) ("a plaintiff who cannot maintain her own complaint has no right to amend it pursuant to Rule 15 of the Federal Rules of Civil Procedure to bring in other parties who will thereafter remain as parties when the complaint is dismissed as to the original plaintiff"); *Schwartz* v. *The*

Olympic, Inc., 74 F. Supp. 800, 801 (D. Del. 1947) ("Plaintiff also seeks to amend his complaint to bring in other parties plaintiff. If he cannot maintain his own complaint, he has no right to amend it").

In the face of these arguments and authorities, the Fund has offered five contentions in support of its position, none of which persuades the Court to alter its original ruling. The Fund places primary reliance upon 28 U.S.C. § 1653, which provides:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

However, the plain language of Section 1653, as well as the cases interpreting it, indicate that Section 1653 is limited to permit amendment of formal pleading deficiencies only, and does not permit the retroactive creation of jurisdiction by substantive amendments. See, *e.g., Church of Scientology* v. *United States*, 499 F. Supp. 1085, 1088 (D. Colo. 1980).[3] Thus, for example, amendment has been permitted under Section 1653 to alter the theory of subject matter jurisdiction existing at the time the action was commenced, see, *e.g., Corporation Venezolana de Fomento* v. *Vintero Sales Corp.*, 477 F. Supp. 615, 618 (S.D.N.Y. 1979), *modified on other grounds*, 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Miller* v. *Davis*, 507 F.2d 308, 311 (6th Cir. 1974), or to correct defective allegations as to jurisdictional amount, see, *e.g., Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9 (1975); *Cox* v. *Livingston*, 407 F. 2d 392 (2d Cir. 1969). On the other hand, amendment under Section 1653 has been denied where the amendment seeks to add a distinct cause of action not pleaded in the original complaint. *Brennan* v. *University of Kansas*, 451 F. 2d 1287, 1289 (10th Cir. 1971).

In the instant case, the jurisdictional "defect" in the Fund's complaint is not one merely of form but rather one of substance. The Fund does not have any claims against defendants within the subject matter jurisdiction of this Court, and there is no formal amendment of the pleadings that can alter that fact. What the

Fund seeks is not to correct a mere technical error in its own pleading in order that it may continue its action against defendants, but rather, by the purported device of an "amendment," to permit a different party or parties to prosecute the action. No precedent for such a result has been cited by the Fund or discovered by the Court. But *cf.*, *Field* v. *Volkswagenwerk AG*, 626 F.2d 293, 306 (3d Cir. 1980) (suggesting in *dictum* that in an action for wrongful death on behalf of the deceased's estate, the substitution of one administratrix for another may be permitted under certain circumstances pursuant to Section 1653). In my view, the Fund's attempt to bootstrap substitute plaintiffs into an action which this Court's jurisdictional limitations do not permit the Fund itself to maintain is not an attempt to cure a mere technical error of pleading but is rather an attempt to effect a substantive modification of an action over which the court otherwise lacks subject matter jurisdiction, and is thus not permissible under Section 1653.

The Fund's other four arguments may be treated summarily. In connection with the dismissal of the Fund's state law claims under the principles of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), the Court noted that such dismissal was without prejudice to the prosecution of such state law claims in a court of competent jurisdiction. The Fund contends that, in so ruling, the Court "overlooked or misapprehended" the "principle of law" that the district courts of the United States have exclusive jurisdiction over the relevant ERISA claims which constitute the "vast majority" of the Fund's claims. The Fund is wrong. By this Court's June 3 Opinion and Order, it has been determined, subject to the Fund's right of appeal, that the Fund has *no* ERISA claims against defendants. Other parties may have claims under ERISA against defendants, but nothing in this Court's June 3 ruling creates any jurisdictional bar to the prosecution of such claims.

The Fund further argues that its "default" is excusable because of its reliance on *Rheingold Breweries Pension Plan* v. *Pepsico, Inc.*, 81 Civ. 1561 (S.D.N.Y. November 17, 1981), in which

Judge Stewart of this Court, after ruling that an employee benefit plan could not maintain an action under Section 502(a) of ERISA, granted leave for plaintiff to amend its complaint to name a proper plaintiff.[4] In that case, however, Judge Stewart treated the issue solely as one of standing under Section 502(a) and did not address the question of subject matter jurisdiction under Section 502(e), and thus did not consider whether there was a jurisdictional bar to the granting of leave to amend. In any event, there is no "equitable" exception to the absolute inability of this Court to act where it lacks subject matter jurisdiction.

The Fund's final two arguments appear for the first time in its reply memorandum. First, the Fund argues that the requirements of subject matter jurisdiction and standing are legally distinct; that the Court's June 3 ruling was in reality a ruling that the Fund lacked standing to prosecute this action; that the action should thus have been dismissed under Rule 12(b)(6), F.R.Civ.P., for failure to state a claim and not under Rule 12(b)(1), F.R.Civ.P., for lack of subject matter jurisdiction; and that as a consequence the Court does have subject matter jurisdiction to entertain and grant the Fund's motion to amend. The Fund's argument ignores the relevant statutory provisions of ERISA. While it is true that the constitutional requirements for standing are distinct from the question of subject matter jurisdiction, Congress has created additional statutory standing requirements in Section 502(a) and, in Section 502(e), incorporated those requirements as prerequisites to the exercise of subject matter jurisdiction. Thus, under the statutory scheme, the Court properly dismissed the action for lack of subject matter jurisdiction, which itself is a prerequisite to the Court's consideration of any motion to dismiss for failure to state a claim.

Finally, the Fund relies upon Rule 17(a), F.R.Civ.P., which proscribes the dismissal of any action on the ground that it is not prosecuted in the name of the real party in interest without allowing an opportunity for substitution of the real party in interest. The Fund's reliance is misplaced; this action was dismissed

for lack of subject matter jurisdiction and not for failure of prosecution in the name of the real party in interest. That it might also have been dismissed under Rule 17(a) after an opportunity for substitution hardly means that this "opportunity" is extended to cases such as the instant case where the court lacks subject matter jurisdiction. Plainly Rule 17(a) does not purport to expand the subject matter jurisdiction of the federal courts, and the rule is thus irrelevant to the Court's June 3 decision and the instant motion.

For these reasons, the Fund's motion to alter or amend the judgment is denied.

SO ORDERED.

WILLIAM C. CONNER

United States District Judge

Dated: New York, New York
August 2, 1982

FOOTNOTES

1. Defendants concede, as they must, that an apparent exception to this principle is the line of cases permitting the dropping of nondiverse parties who are not indispensable in order to preserve diversity jurisdiction; *i.e.*, in order to satisfy the requirement of "complete" diversity first enunciated in Strawbridge v. Curtiss, 7 U.S. (3 Cranch 267 (1806). The rationale of these decisions appears to be that the cause of action among the diverse parties is conceptually distinct, and the deletion of unnecessary parties in order to "preserve" or "retain" diversity jurisdiction over this separable portion of the lawsuit is thus permissible. See, *e.g.*, Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (18); Kerr v. Compagnie De Ultramar, 250 F.2d 860 (2d Cir. 1958); Karakatsanis v. Conquestador Cia. Nav., S.A., 247 F. Supp. 423 (S.D.N.Y. 1965). The justification for this approach may perhaps be found in the fact that the requirement of "complete" diversity, in contrast to federal jurisdiction generally, is not of constitutional dimension. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978); State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1966). In any event, this line of cases appears to be *sui generis* and to have no implication for circumstances such as exist here, where the Court lacks jurisdiction over every "portion" of the case, and what the proposed amendment would accomplish is not the "dropping" of an unnecessary party in order to "preserve" jurisdiction, but rather the complete *substitution* of a new plaintiff or plaintiffs in order to *create* retroactively jurisdiction where none had existed before.

2. The court in *Oster* distinguished Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir. 1941), in which the court permitted a new plaintiff to prosecute an action in which the original plaintiffs' claims failed to satisfy the jurisdictional amount requirement. A reading of the *Hackner* opinion, however, reveals that the court permitted that result solely because, as a practical matter, requiring the new plaintiff to commence a new action would eventually bring the parties to the same position they occupied in the existing lawsuit. In light of the Second Circuit's prior opinion in *Pianta*, 77 F.2d 888, it does not appear that the *Hackner* result should apply where, as here, there are possible statute of limitations defenses which the plaintiff seeks to avoid by resurrecting a case over which the court lacks subject matter jurisdiction.

3. As detailed in the Memorandum of Law of Defendants Reserve Life Insurance Co. and American Progressive Life and Health Insurance Company of New York, the legislative history of Section 1653 and its predecessor statute also indicates that the purpose of Section 1653 is to avoid the nonsuit of a plaintiff which could have but did not include the proper allegations of jurisdiction in the complaint, rather than permitting substantive modifications of an action over which the court lacks subject matter jurisdiction.

4. The Fund's claim of reliance on *Rheingold* is most surprising, since that decision should have put the Fund on notice that it could not maintain this action.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-second day of April, one thousand nine hundred and eighty-three.

No. 82-7631

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND,
Plaintiff-Appellant,

v.

CONTINENTAL ASSURANCE CO., *et al.*,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Pressroom Unions-Printers League Income Security Fund, and the panel that heard the appeal having denied said petition in an order filed on April 7, 1983,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, CLERK

by Francis X. Gindhart,
.....
FRANCIS X. GINDHART,
Chief Deputy Clerk